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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-260

L. N. McDONALD and RAYMOND L. LAIRD,

Petitioners,

v.

SANTA FE TRANSPORTATION COMPANY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

LARRY M. LAVINSKY
300 Park Avenue
New York, New York 10022

ARNOLD FORSTER
315 Lexington Avenue
New York, New York 10016

Attorneys for Anti-Defamation League of B'nai B'rith

AMOS ALTER
DONALD A. DERFNER
JUSTIN J. FINGER
EDWARD N. LEAVY
JOY MEYERS
Of Counsel

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906

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The undersigned, as counsel for the Anti-Defamation League of B'nai B'rith, respectfully move this Court for leave to file the accompanying brief *amicus curiae*, in support of the position of Petitioners to the extent that they seek (1) a reversal of the judgment below dismissing for lack of jurisdiction their claim under 42 U.S.C. §1981 on the ground that the section confers no actionable rights on white persons, and (2) a determination that white claimants

are entitled to the same protection against racial discrimination under Title VII of the Civil Rights Act of 1964 as are Blacks.

Consent to file the attached brief has been sought from the parties. Petitioners and Respondent Teamsters Freight, Tank Line and Automobile Industry Employees, Local Union 988, have granted such permission; however, Respondent Santa Fe Transportation Company has refused to consent. It is therefore necessary to request permission of this Court under Rule 42.

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally interested in protecting the nature and quality of the rights of all people, and in assuring that all people are treated equally, regardless of their religion or race.

Among its many other activities directed to these ends, the Anti-Defamation League has in the past filed *amicus* briefs in this and other courts urging the unconstitutionality or illegality of racially discriminatory laws and practices in such cases as, *e.g., Shelley* v. *Kraemer,* 334 U.S. 1 (1947); *Sweatt* v. *Painter,* 339 U.S. 629 (1950); *Brown* v. *Board of Education,* 347 U.S. 483 (1954); *Colorado Anti-Discrimination Commission* v. *Continental Airlines, Inc.,* 372 U.S. 714 (1963); *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968); *Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S.

229 (1969); *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973) and *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974).

As one of the nation's oldest civil rights and human relations agencies, and one which has been concerned with the rights of all people, be they majority or minority, the Anti-Defamation League respectfully offers this Court its accumulated experience on the issues raised by this case.

It seeks to submit the accompanying brief because it believes that the decision below, which narrows the protection afforded white people against racial discrimination, does violence to the concept of equality under law for all people.

Respectfully submitted,

LARRY M. LAVINSKY
300 Park Avenue
New York, New York 10022

ARNOLD FORSTER
315 Lexington Avenue
New York, New York 10016

Attorneys for Anti-Defamation League of B'nai B'rith

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300 Park Avenue
New York, New York 10022

ARNOLD FORSTER
315 Lexington Avenue
New York, New York 10016

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BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH *AMICUS CURIAE*

This brief is submitted on behalf of the Anti-Defamation League of B'nai B'rith, *amicus curiae,* in support of the position of petitioners to the extent that they seek (1) a reversal of the judgment below dismissing for lack of jurisdiction their claim under 42 U.S.C. §1981 on the ground that the section confers no actionable rights on white persons, and (2) a determination that white claimants are entitled to the same protection against racial discrimination in employment under Title VII of the Civil Rights Act of 1964 as are Blacks.

Questions Presented

(1) Whether 42 U.S.C. §1981 accords rights and standing to sue to white persons alleging discrimination on the basis of their race.

(2) Whether white claimants are entitled to the same protection against racial discrimination under Title VII of the Civil Rights Act of 1964 are Blacks.

Interest of the *Amicus*

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally interested in protecting the nature and quality of the rights of all people, and in assuring that all people are treated equally, regardless of their religion or race.

Among its many other activities directed to these ends, the Anti-Defamation League has in the past filed *amicus* briefs in this and other courts urging the unconstitutionality or illegality of racially discriminatory laws and practices in such cases as, *e.g.*, *Shelley* v. *Kraemer*, 334 U.S. 1 (1947); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Colorado Anti-Discrimination Commission* v. *Continental Airlines, Inc.*, 372 U.S. 714 (1963); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973) and *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974).

It submits this brief because it believes that the decision below, which narrows the protection afforded white people against racial discrimination, does violence to the concept of equality under law for all people regardless of race.

Statement of the Case

The two petitioners, both whites, and a third individual, a Black, were employees of the respondent, Santa Fe Transportation Company ("Santa Fe"). On September 26, 1970, respondent charged them all with misappropriation of certain company property. (App. p. 6) On October 2, 1970, petitioners were discharged by Santa Fe, while the Black employee was not discharged. (App. pp. 6-7) Petitioners thereafter initiated these proceedings in the United States District Court for the Southern District of Texas, claiming in their second amended complaint that the "Defendant imposed a more severe disciplinary sanction against them because of their race." (App. p. 38) They sought relief under Title VII of the Civil Rights Act of 1964, as amended, and under 42 U.S.C. §1981.

The district court dismissed the second amended complaint, with prejudice (App. pp. 103-107), holding that "the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Negro employee does not raise a claim upon which

Title VII relief may be granted." (App. p. 107) The court also held that "§1981 is inapplicable to white persons." (App. p. 104)

The Court of Appeals for the Fifth Circuit affirmed in a *per curiam* opinion (513 F.2d 90 [5th Cir. 1975]) expressly agreeing with the contention that §1981 "confers no actionable rights on white persons" and that "an employer's dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Black employee does not raise a claim upon which relief may be granted under Title VII."

A petition for writ of certiorari to review the judgment of the Court of Appeals was granted by this Court on November 3, 1975.

ARGUMENT

White victims of racial discrimination are entitled to the same rights and standing to sue under the Civil Rights Acts of 1866 and 1964 as are members of a minority race.

In the last quarter century, our nation, spearheaded by this Court, has been engaged in an effort to make the twin ideals of equality under law and equality of opportunity a living reality by eliminating once and for all the blight of racial discrimination. The Civil Rights Act of 1866, resurrected by this Court in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), and the Civil Rights Act of 1964 provide a formidable arsenal of weapons against such discrimination, particularly in the employment area.

Through these statutes and court decisions interpreting them, much has been accomplished in sensitizing the business community to the many, often subtle, forms of discrimination which have in the past barred the way to the employment and advancement of minority group members. As a result of the activities of various governmental agencies such as the Office of Contract Compliance and the Equal Employment Opportunity Commission, affirmative action programs containing goals and timetables for the hiring and promotion of minority group members are now common.

In the process of remedying the effects of past evils, however, we have seen the development of a new form of racial discrimination in which white people are now the victims. This distinctly modern form of discrimination, if more subtle and less pervasive, is no less destructive of individual aspirations, no less a divider of society and no less a moral wrong than the racism of the past.

In the case at bar and others to be decided this term, this Court will determine whether equality under law is indeed to be the rule for all people. At a time of declining job opportunities the choices are not easy ones. But anything less than a reaffirmation of the right of the individual to equal treatment under law, whatever his or her race, can only lead to increased racial tensions and to a loss of faith in the rule of law itself, with untold damage to the fabric of our society.

§1981 is applicable to white victims of racial discrimination.

The decision below, excluding white victims of racial discrimination from the protection of §1981, is required neither by the plain wording of the statute nor its legislative history. That section, derived from §1 of the Civil Rights Act of 1866, provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and actions of every kind, and no other."

§1981 sets forth at its very outset who shall be the beneficiaries of its provisions: "All persons within the jurisdiction of the United States". There follows a specification of the rights conferred upon "all persons", namely, the right to make and enforce contracts, to sue, be parties, give evidence, etc. The phrase "as is enjoyed by white citizens" sets forth the standards for determining the quality and extent of the enumerated rights conferred by the statute. That standard was framed in terms of the most favored group in 1866, *i.e.*, white citizens. Thenceforth, these rights were to be enjoyed to the same extent by "all persons".

The legislative history of §1981 supports this interpretation. Indeed, §1 of the Civil Rights Act of 1866 expressly

referred to "citizens of every race and color".[1] Lyman Trumbull,[2] Chairman of the Senate Judiciary Committee, who was the manager and principal author of the Civil Rights Act of 1866, made undisputably clear that the statute was to apply to white persons as well as Black:

> "Sir, this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness; and that is abominable and iniquitous and unconstitutional! Could anything be more monstrous or more abominable than for a member of the Senate to rise in his place and denounce with such epithets as these a bill, the only object of which is to secure equal rights to all the citizens of the country, a bill that protects a white man just as much as a black man? With what consistency and with what fact can a Senator in his place here say to the Senate and the country that this is a bill for the benefit of black men exclusively when there is no such distinction in it, and when the very object of the bill is to break down all discrimination between black men and white men?" (Cong. Globe, 39th Cong., 1st Sess. 599 [1866].)

While this statement predated the House of Representatives' addition of the words "as is enjoyed by white citizens" to the bill, this addition did not constrict its scope.

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1. In 1870, the 1866 statute was reenacted with revised wording which substituted for the words "of every race and color" the present words "within the jurisdiction of the United States." See *United States* v. *Wong Kim Ark*, 169 U.S. 649, 695-6 (1898). This Court there stated that the change in wording "was not considered as making the section, as it now stands, less applicable to persons of every race and color and nationality, than it was in its original form . . ."

2. This Court has heretofore given Senator Trumbull's remarks substantial weight in construing the Civil Rights Act of 1866. (*Jones* v. *Alfred H. Mayer Co., supra,* at 429-30.)

As Senator Trumbull observed upon the bill's return to the Senate:

> "I quite agree with the Senator from West Virginia that these words ['as is enjoyed by white citizens'] are superfluous. I do not think they alter the bill . . . We did not think it worthwhile to send the bill back just because these words were inserted by the House . . . [A]s in the opinion of the committee which examined this matter, they did not alter the meaning of the bill, the committee thought it proper to recommend a concurrence, and I hope the Senate will concur in it." (Cong. Globe, 39th Cong. 1st Sess. 1413 [1866].)

The debates in the House of Representatives do not suggest a different interpretation. On the contrary, the following statement by James F. Wilson, the bill's floor manager, makes clear his understanding that the words "as is enjoyed by white citizens", which were added on his motion, were not intended to restrict the bill's coverage to Black people alone:

> "Mr. Speaker, if all our citizens were of one race and one color we would be relieved of most of the difficulties that surround us. This bill would be almost, if not entirely, unnecessary, and if the States, seeing that we have citizens of different races and colors, would but shut their eyes to these differences and legislate, so far at least as regards civil rights and immunities, as though all citizens were of one race and color, our troubles as a nation would be well-nigh over. But such is not the case, and we must do as best we can to protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men." (Cong. Globe, 39th Cong., 1st Sess. 1118 [1866].)

While the Civil Rights Act of 1866 was enacted pursuant to the power invested in Congress by the 13th Amendment, that source of authority does not establish a Congressional intent to limit the statute's applicability only to persons of the Black race. Though born out of the slavery of Black people, the 13th Amendment itself is universal in its language and applicability. See *Civil Rights Cases*, 109 U.S. 3, 22, 35 (1883); *Hodges* v. *United States*, 203 U.S. 1, 16-17 (1906); *Bailey* v. *State of Alabama*, 219 U.S. 219, 240-241 (1910).[3]

In any event, the 1870 reenactment of the statute was passed pursuant to the provisions of the 14th Amendment which this Court in *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) and *United States* v. *Wong Kim Ark*, 169 U.S. 649, 695 (1898) characterized as "universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color or of nationality." Indeed, as this Court observed in *Tillman* v. *Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, n. 11 at 439 (1973) the "changes in wording" in the 1870 Act "may have reflected the language of the 14th Amendment".[4]

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3. In *Hodges*, the 13th Amendment was characterized as ". . . the denunciation of a condition, and not a declaration in favor of a particular people. It reaches every race and every individual." Likewise, in *Bailey*, Mr. Justice Hughes described the Amendment as "a charter of universal civil freedom for all persons of whatever race, color, or estate . . . ." While *Jones* v. *Alfred H. Mayer Co., supra*, overruled *Hodges* to the extent its holding rested upon an overly restrictive "concept of Congressional power under the Thirteenth Amendment" (392 U.S. n. 78 at 441), *Jones* did not denigrate the Amendment's universal applicability.

4. While the 14th Amendment speaks in terms of state action, statutes enacted pursuant to the authority of that Amendment are not necessarily so limited. *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971). In *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459-460 (1975), this Court expressly held that "§1981 affords a federal remedy against discrimination in private employment on the basis of race."

The decision below which deprives §1981 of its applicability to "all persons" regardless of race, not only runs counter to the plain language of the statute, it needlessly creates a constitutionally suspect racial classification under the due process clause of the 5th Amendment.[5] No such interpretation was intended by Congress in 1866. No such interpretation is legally appropriate or socially permissible in our time.

White claimants are entitled to the same protection against racial discrimination under Title VII as are Blacks.

The District Court dismissed petitioners' claim under Title VII for failure to "raise a claim upon which Title VII relief may be granted." The Court of Appeals affirmed on the same basis. It is not clear whether this holding was predicated upon the fact that petitioners failed to allege their innocence of the felony charged, or whether the courts below held that because petitioners are members of the white race they somehow have a lesser degree of protection under Title VII.

5. In *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975), it was observed:

> "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."

Accordingly, under the 5th Amendment, as under the 14th, classifications on the basis of race are "constitutionally suspect . . . subject to the most rigid scrutiny . . . and in most circumstances irrelevant to any constitutionally acceptable legislative purpose." *McLaughlin* v. *Florida*, 379 U.S. 184, 191-92 (1964). While providing protection against discrimination to newly freed Black slaves unquestionably constituted a compelling legislative purpose, there would have been no justification even in 1866 for excluding members of other races from the same protection.

This *amicus* does not take a position with respect to the rights, if any, of alleged felons to make claims of discrimination under Title VII. It asks only that this Court make clear that whatever protection is afforded such persons is available without regard to the race of the claimant.

Any disparity in the protection afforded by Title VII, based upon the claimant's race—even where he or she happens to be accused of a felony—would do violence to the Congressional mandate prohibiting discrimination against "any individual . . . because of such individual's race . . ." 42 U.S.C. 2000e-2(a)(1).[6]

As this Court stated in discussing Title VII, both in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971) and in *McDonnell Douglas Corporation* v. *Green*, 411 U.S. 792, 800 (1973):

> "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."

6. §2000e-2. (a) It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

Conclusion

For the foregoing reasons, this *amicus* respectfully urges this Court to hold that the rights afforded victims of racial discrimination under the Civil Rights Acts of 1866 and 1964 are the same regardless of their race.

Respectfully submitted,

LARRY M. LAVINSKY
300 Park Avenue
New York, New York 10022

ARNOLD FORSTER
315 Lexington Avenue
New York, New York 10016

Attorneys for Anti-Defamation League of B'nai B'rith

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